Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

EDGAR D. McCLURE,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Allocatur To The Supreme Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

JAMES R. HANKLE
(*Counsel of Record*)

SHERRARD, GERMAN & KELLY, P.C.
Attorneys at Law
35th Floor, One Oliver Plaza
Pittsburgh, Pennsylvania 15222-2602
(412) 355-0200
FAX: (412) 261-6221

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

The Pennsylvania Rules of Evidence, as promulgated by the Supreme Court of Pennsylvania, provide that an adult defendant cannot be impeached on cross-examination for prior sexual conduct with another adult, except by record of conviction.

Petitioner was convicted on several counts of child molestation. Defense counsel at trial refused to put him on the stand in his own defense on the grounds that he would be subject to questioning by the prosecution regarding a later sexual tryst with the mother of the victims. Defense counsel relied on character witnesses alone. New appellate counsel raised a claim of ineffective assistance of trial counsel because evidence of the affair with the mother was inadmissible under the Pennsylvania Rules of Evidence. There was no reason not to allow Petitioner to take the stand. After the appropriate rules of evidence were raised in the trial court, the Superior Court of Pennsylvania, and, finally, the Supreme Court of Pennsylvania, all refused to respond to the issue raised, as the two appellate courts merely adopted the opinion below.

The questions presented are:

1. Whether Petitioner is entitled to a written opinion by state appellate courts in order to satisfy the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment's right to effective assistance of counsel;

QUESTIONS PRESENTED – Continued

2. Whether the use of summary dispositions of appeals by state courts interferes with the ability of the accused's counsel to carry out an effective appeal;

3. Whether state appellate courts should fall into the same category as administrative and probation hearings that require written opinions in support of decisions.

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PETITION FOR ALLOCATUR FROM THE SUPREME COURT OF PENNSYLVANIA

Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Pennsylvania.

OPINIONS BELOW

The order of the Supreme Court of Pennsylvania is reported at 2000 WL 36083 (PA) and reproduced in the Appendix; the per curiam order of the Superior Court is unreported and reproduced in the Appendix; the opinion of the trial court is unreported and reproduced in the Appendix.

JURISDICTION

Supreme Court of Pennsylvania entered its order on January 13, 2000 (App., infra).

The jurisdiction of this Court is invoked under 28 U.S.C § 1257(a).

PENNSYLVANIA STATE RULES OF EVIDENCE

Pennsylvania Rules of Evidence, Rule 608. Evidence of Character and Conduct of Witness

Rule 608 reads as follows:

(a) Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence

in the form of reputation as to character, but subject to the following limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness; and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

(b) Specific Instances of conduct. Except as provided in Rule 609 (relating to evidence of conviction of crime),

(1) the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct; however,

(2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truthfulness or untruthfulness; but extrinsic evidence thereof is not admissible.

Rule 609. Impeachment by Evidence of Conviction of Crime

Rule 609 reads as follows:

(a) General Rule. For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, shall be admitted if it involved dishonesty or false statement.

STATEMENT OF THE CASE

On June 9, 1998, a three hour trial was held in the Court of Common Pleas of Carbon County Pennsylvania, and Edgar D. McClure ("Petitioner") was found guilty by a jury of five (5) counts of rape, five (5) counts of statutory rape, four (4) counts of involuntary deviate sexual intercourse, nineteen (19) counts of indecent assault, two (2) counts of corruption of minors, and two (2) counts of criminal conspiracy. Petitioner was sentenced to a prison term of nineteen (19) to thirty-eight (38) years.

The facts at trial indicate that defense counsel failed to put Petitioner on the stand in his own defense but rather relied solely on character witnesses on behalf of his client. The prosecution's case consisted of the testimony of the two female victims. In a post-sentence motion and hearing, Petitioner was represented by new counsel who argued, *inter alia,* ineffective assistance by trial counsel for not affirmatively advising Petitioner to testify in his own defense when Petitioner's testimony would have been exculpatory and not have exposed Petitioner to impeachment regarding prior sexual conduct with the mother of the victims.

The trial court rejected the citation of error on ineffectiveness of counsel by concluding that trial counsel was justified in not calling on Petitioner to testify for two reasons. First, Petitioner would have been subject to cross-examination by revealing that he had visited the house of the two girls. Secondly, the prosecution would have been able to expose to the jury on cross-examination that Petitioner had had a sexual liaison with the mother of the girls on an occasion after the children had been

molested. Petitioner has argued that the perceived evidence relating to the tryst with the mother was absolutely barred by the Pennsylvania rules of evidence and, therefore, that trial counsel's basic reason for not putting him on the stand had no merit, since the testimony of the girls had already established his presence in the home. Trial counsel's reasoning was fundamentally flawed.

The trial court's opinion was silent on the issue of the rules of evidence. In Petitioner's post-trial appeal to the Superior Court of Pennsylvania, the intermediate appellate court, the issue was raised with emphasis. That Court, however, issued a ruling that "We . . . adopt the trial court opinion in its entirety and affirm on that basis." Once again, the judiciary refused to address the issue of the rules of evidence. An appeal was then taken to the Supreme Court of Pennsylvania, which simply refused to grant review. In sum, while Petitioner's central argument was raised at all levels, none of the courts responded to the issue of what the appropriate rules of evidence meant in their application to this case.

At all times in these appellate proceedings, Petitioner has insisted that the failure of these courts to issue opinions in support of their rulings violated the Due Process Clauses of the Pennsylvania and Federal Constitutions. In specific terms, Petitioner alleges that it is Constitutional error on the part of the Pennsylvania judiciary to refuse to interpret the rules of evidence of the Pennsylvania Supreme Court and thereby deprive appellate counsel of the guidance and information needed to properly plan an appellate strategy in defense of his client as provided by the Sixth Amendment.

REASONS FOR GRANTING THE PETITION

I. THE CONVERGENCE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL PROVIDED BY THE SIXTH AMENDMENT REQUIRE THE APPELLATE COURTS OF THE COMMONWEALTH OF PENNSYLVANIA TO ISSUE REASONED OPINIONS IN SUPPORT OF THEIR RULINGS.

A. By simply adopting the fragmented opinion of the trial court without issuing supporting opinions, the state appellate courts thereby deprived the accused of his constitutional right to have zealous and informed legal defense on appeal.

B. State appellate courts should be held to the same standards as administrative and probation hearings that require written opinions in support of decisions.

A.

By simply adopting the fragmented opinion of the trial court without issuing supporting opinions, the state appellate courts thereby deprived the accused of his constitutional right to have zealous and informed legal defense on appeal.

This appeal raises the important and novel question of whether the provisions of the Due Process Clauses of the Fourteenth and Sixth Amendments guarantee of effective assistance of counsel converge in their requirements so as to mandate that state appellate courts issue reasoned opinions to explain and justify their rulings. It is intended here to provoke consideration of a problem that arises when a convicted defendant and his new

appellate attorney appeal the verdict by requesting the state courts to interpret the State Supreme Court's own rules of evidence, only to have these judicial bodies remain silent, thereby failing to offer any reason by which counsel could plan and execute an appeal. The result of the refusal to issue opinions for their rulings forces appellate counsels to work in legal darkness and, in such a context, to properly advise clients. The very judicial process itself, in short, ironically creates a denial of effective assistance of counsel.

In this case, the Federal claim of Due Process was duly raised in the appeals to the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania. *Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. O'Connor*, 404 U.S. 210 (1971).

Because this practice of failing to write opinions is pervasive among the States and leads inexorably to similar results throughout the country, the instant issue meets the criteria necessary to constitute a matter of grave legal concern that demands Constitutional review.

The general issue has been characterized in academic literature as "the constitutional right to know why." Martha I. Morgan, *The Constitutional Right to Know Why*, 17 Harvard Civil Rights Civil Liberties Law Review 297 (1982). The literature covers a wide range of reasons for state appellate courts to write opinions, including First Amendment rights, sentencing, and the value of individualized human dignity, all of which fall within the parameters of the Due Process Clauses. See also: T. Emerson, *Legal Foundations of the Right to Know Why*, 1976 Washington University Law Quarterly 1 (1976). At this point,

however, there has been no judicial reasoning on the requirement of written opinions as related to the Sixth Amendment.

While the concept of effective assistance is usually limited to trial tactics, it is no less important to apply the same standards to appellate representation where it is well-settled that ineffectiveness will also lie. *Cerbo v. Fauver*, 616 F.2d 714 (3rd Cir. 1980), *cert. denied*, 449 U.S. 858 (1980); *Commonwealth v. King*, 253 Pa. Super. 224, 384 A.2d 1314 (1978); *Commonwealth v. Townsell*, 474 PA. 563, 379 A.2d 98 (1977) (addressing the necessity of developing a strategy for appeals).

The landmark case of *Strickland v. Washington*, 466 U.S. 668, 685 (1984) held that the United States Constitution guarantees a fair trial based on the Due Process Clause, and the basic elements of a fair trial are derived from the Sixth Amendment's Counsel Clause. *Strickland's* convergence of these two Constitutional principles should be extended to appellate procedures as well.

This raises again the agonizing problem of how counsel is expected to provide adequate guidance to a client in the absence of written reasons for appellate decisions. While federal courts have no supervisory power over state trial courts, the "work of appellate judges is facilitated when trial judges . . . explain controversial rulings" in accordance with due process principles, even though the occasion for explanations are "the exception rather than the rule." *Harris v. Rivera*, 454 U.S. 339 (1987). Where there is a valid allegation that evidence would have been barred from trial because of a state rule, thus demolishing trial counsel's reasoning in not putting Petitioner on the

stand, summary dispositions by the appellate courts must be seen as providing one of those exceptions.

The right to counsel "is the right to *effective* assistance of counsel," *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970), and there should be no interference with the ability of counsel to make independent decisions about how to conduct a defense. *Geders v. United States*, 425 U.S. 80 (1976). The defense process must, by necessity, include the appellate process. Denial of effective counsel is a direct violation of due process and the right to a fair trial. *Powell v. Alabama*, 287 U.S. 45, 58 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963). The same standard should apply to the appellate process, for while it appears repugnant to our sense of fair play to have a trial court deny defendant's access to information required for the preparation of a defense at that level, it should be equally improper to deny appellants critical information that is needed for the appellate process. "Due process embodies the differing rules of fair play." *Hannah v. Larche*, 363 U.S. 420 (1960). A rejection of the written appellate reasons requirement is inconsistent with our constitutional plan of government at the trial stage, and for identical reasons in the appeals process. The failure of appellate courts to state in writing the reasons for their decisions is one of the most pernicious ingredients of judicial unfairness.

This Court's own decisions regarding the right to appellate due process have not yet indicated a finality on the subject. In *Kimmel v. Morrow*, 477 U.S. 365, 383 (1986), this court decided that relief on ineffective assistance grounds will be afforded regardless of the "underlying attorney error." Indeed, for an appellant to have a fair

chance to present persuasive arguments, it is essential for the appellate court to properly perform its function by offering "each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts v. Lucey*, 469 U.S. 387, 406 (1985) (the Due Process Clause puts limitations on the State's adjudication of the appellate process in criminal cases); See also: *Griffin v. Illinois*, 351 U.S. 12 (1956).

Other federal courts that have addressed this issue have invariably decided that a claim of ineffective assistance may be based on counsel's incompetent handling of a state law issue. *Mayo v. Henderson*, 13 F.2d 528, 523 (2d Cir. 1994); *Gray v. Lynn*, 6 F.3d 265 (5th Cir. 1993); *Prichard v. Lockhart*, 990 F.2d 352 (8th Cir. 1993). In a more recent holding, this Court has reversed and remanded a decision of the Virginia Supreme Court on the grounds that evidence before a jury should have been excluded as an influencing factor, but that the Virginia courts failed to inquire into the matter. *Tuggle v. Netherland*, 516 U.S. 10 (1995).

The American Bar Association Standards Relating to the Administration of Criminal Justice (Third Ed. 1992) provide in pertinent parts:

Standard 4-8.4 Conduct of Appeal

(a) Appellate counsel should be diligent in perfecting appeals and expediting their prompt submission to appellate courts.

Standard 4-8.5 Post-conviction Remedies

After a conviction is affirmed on appeal, appellate counsel should determine whether

> there is any ground for relief under other post-conviction remedies. If there is a reasonable prospect of a favorable result, counsel should explain to the defendant the advantages and disadvantages of taking such action. Appellate counsel is not obligated to represent the defendant in a post-conviction proceeding unless the client has agreed to do so. In other respects, the responsibility of a lawyer in a post-conviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases.

It is imperative to ask how appeals can be perfected when state appellate courts outright refuse to address valid issues properly before them and thus eclipse a matter of fundamental importance to an incarcerated defendant. How, as required by law, can appellate counsel adequately weigh whether to even take an appeal in the first instance? *Anders v. California*, 386 U.S. 738 (1967). And finally, what justice is there in having clients pay good coin to appellate attorneys who are forced to make educated guesses in the face of a mute judicial system?

B.

State Appellate Courts should be held to the same standards as administrative and probation hearings that require written opinions in support of decisions.

In the area of administrative law, federal courts have generally required that decisions be based on formal findings. A leading case, *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978), held that a reasoned explanation is designed "to inform the aggrieved person of the grounds of the administrative action so he can plan his

course of action." A person adversely affected by a decision, and their counsel as well, are thereby in a much better position to determine the legitimacy of a holding. Additionally, the reasoned explanation requirement forces a disclosure of why a particular decision was reached and in a cumulative sense leads to greater consistency in the law. See also: *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (procedural due process requiring a statement of reasons to terminate welfare benefits is one of the "minimum procedural safeguards" attaching to administrative proceedings).

This Court has held, as well, that a required statement of reasons flows from the Due Process Clause to parole revocation and probation proceedings and prison disciplinary procedures. See, respectively, *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Wolff v. McDonnell*, 418 U.S. 559 (1974).

The marked trend in the case law of this Court, therefore, is towards granting increased access to the reasons behind judicial actions. While this impulse seems strongest in administrative and parole and pardon cases, the basic rationale must apply equally to state appellate courts that should offer guidance to those defendants and their attorneys in preparing a defense for one whose very life hangs in the balance. An accused who is denied effective assistance of counsel because of an infringement of the Due Process Clause under these factual circumstances is effectively denied the opportunity to redress any harm caused by state appellate courts.

CONCLUSION

Linked together under the Bill of Rights, the Due Process Clause and the Sixth Amendment's guarantee of effective assistance of counsel mandate that state appellate courts, when faced with a challenge to their own rules, offer a written reason for their decisions. Otherwise, there is no basis on which to assess the court's actions, leaving a defendant in a "legal limbo" on appeal. The present system by which state courts fail to explain the reasons why an appeal is unsuccessful violates a defendant's constitutional right to effective assistance of counsel.

Petitioner respectfully requests that this Petition be granted so that he can pursue a knowledgeable and informed course of appeals in the state courts.

Respectfully submitted,

JAMES R. HANKLE, ESQUIRE
Attorney for Petitioner

SHERRARD, GERMAN & KELLY, P.C.
Attorneys at Law
35th Floor, One Oliver Plaza
Pittsburgh, Pennsylvania 15222-2602
(412) 355-0200
FAX: (412) 261-6221

APPENDIX A

IN THE COURT OF COMMON PLEAS OF
CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
vs.	:	No. 260 CR 96
EDGAR D. McCLURE, Defendant	:	

David W. Addy, Esquire — Counsel for Commonwealth
Assistant District Attorney

James R. Hankle, Esquire — Counsel for Defendant

OPINION AND ORDER

Webb, J. – November 20, 1998

Edgar D. McClure has filed Post-Sentence Motions to the judgments of sentence imposed for various sexual offenses committed against two minor girls.

FACTS

The facts, when viewed most favorably to the Commonwealth as verdict winner, begin with the dysfunction of the family of the victims, Melissa and Jennifer, born on November 28, 1979 and October 28, 1985, respectively. The girls have never been married, and are two of twelve children born to parents Brian and Susan O'Neill. N.T. 6/9/98 at 17-18, 31, 47 & 55. The dysfunction began with

Brian subjecting Susan and the children to physical abuse, *id.* at 19-21 & 48-49, and escalated to his use of threats and beatings to force Melissa and Jennifer to engage in sexual acts with him and other men. *Id.* at 19-30 & 49-55. Neither girl understood the nature or wrongfulness of the sexual behavior, but submitted because they feared their father. *Id.* at 26-30 & 54-55.

This pattern of abuse continued after the family moved to Carbon County in 1987, *id.* at 18, where the father allowed McClure to sexually molest Melissa approximately once every month or every other month during 1990 through 1992. The father would send Melissa to his bedroom with McClure to "play house," his euphemism for sex, and peek through or listen at the door, while McClure engaged in vaginal and oral sex with Melissa. *Id.* at 24-33. During this time period, McClure was in his fifties, *Id.* at 62, while Melissa was only 10 to 12 years old.

Eventually, the sexual molestation extended to Jennifer, who was subjected to vaginal intercourse with McClure approximately once or twice a month during 1991 through 1992. *Id.* at 50-55. When Jennifer was only 5 and 6 years old, the father would take her to his bedroom with McClure, order her to undress, and watch as McClure engaged in vaginal intercourse.

Despite the multiple occurrences in each year, McClure was charged with only one count of the various crimes per year in regard to each girl. The jury found Defendant guilty of all charges submitted to it. Specifically, for the sexual abuse of Jennifer, McClure was

convicted of rape[1], statutory rape[2], indecent assault[3], corruption of minors[4], and conspiracy. As to Melissa, the convictions included these crimes as well as involuntary deviate sexual intercourse (IDSI)[5]. Timely Post-Sentence Motions were then filed.

---

[1] The amended 1984 rape statute was in effect during the incidents in question and provided, inter alia, that a person commits rape when he engages in sexual intercourse with another person not his spouse, who is so mentally deficient that such person is incapable of consent. 18 Pa.C.S.A. § 3101 & § 3121(4).

[2] A person who is 18 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 14 years of age. 18 Pa.C.S.A. § 3101 & § 3122 (1976).

[3] A person who has indecent contact with another not his spouse, or causes the complainant to have indecent contact with him, is guilty of indecent assault, . . . if (1) he does so without the consent of the other person; (2) he knows that the other person suffers from a mental defect which renders her incapable of appraising the nature of her conduct; (3) he knows that the other person is unaware that a (sic) indecent contact is being committed; or (6) he is over 18 years of age and the other person is under 14 years of age. 18 Pa.C.S.A. § 3126(1) (2) & (3) (1976); 18 Pa.C.S.A. § 3126(6) (effective 4/3/90).

[4] Whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, . . . is guilty of a misdemeanor of the first degree. 18 Pa.C.S.A. § 6301 (1978).

[5] A person commits a felony of the first degree when he engages in deviate sexual intercourse with another person: (4) who is so mentally . . . deficient that such person is incapable of consent; or (5) who is less than 16 years of age. 18 Pa.C.S.A. § 3101 & § 3123(4)(5) (1973).

DISCUSSION

Defendant raises the issues of the sufficiency of the evidence, the weight of the evidence, prosecutorial misconduct and the ineffectiveness of his trial attorneys.

SUFFICIENCY OF EVIDENCE

Defendant challenges the sufficiency of the evidence to support his convictions for conspiracy and all of the sex offenses. The standard for reviewing the sufficiency of the evidence is whether the evidence admitted at trial and all reasonable inferences drawn therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, is sufficient to support all elements of the offenses beyond a reasonable doubt. *Commonwealth v. Miller,* 664 A.2d 1310, 1314 (Pa. 1995), *cert. denied,* ___ U.S. ___, 116 S.Ct. 932, 133 L.E.2d 859. In sex offense prosecutions, the testimony of the victim, standing alone, is sufficient to convict. *Commonwealth v. Kunkle,* 623 A.2d 336 (Pa.Super. 1993), *alloc. denied,* 637 A.2d 281 (Pa. 1993).

Here, the testimony of both victims amply supported Defendant's convictions. Melissa attested to vaginal and oral intercourse during 1990 through 1992, supporting the convictions for rape and IDSI, respectively. For Jennifer, her testimony of vaginal intercourse supported the rape convictions for the years 1991 and 1992. The indecent assaults and corruption of minors are sustained by any of the sexual contacts.

LACK OF SPECIFIC DATES

Nonetheless, Defendant argues that the Commonwealth did not establish with any degree of specificity particular dates on which the sexual acts occurred. While the Commonwealth must establish to a reasonable degree of certainty the approximate date of the offense charged it need not always prove a single specific date of the crime. *Commonwealth v. Robinson*, 462 A.2d 840, 842 (Pa. Super. 1983), *quoting, Commonwealth v. Devlin*, 333 A.2d 888, 899 (Pa. 1975). *Accord: Commonwealth v. Niemetz*, 422 A.2d 1369 (Pa.Super. 1980).

> [T]he rule has been somewhat relaxed when the victim is a child . . . When a young child is a victim of a crime, it is often impossible to ascertain the exact date when the crime occurred. He or she may have a vague sense of the days of the week, the months of the year, and the year itself. If such children are to be protected, imprecision concerning times and dates must be tolerated.

Commonwealth v. Luktisch, 680 A.2d 877, 880 (Pa.Super. 1996) (citations omitted). Any leeway permissible would vary with the nature of the crime and the age and condition of the victim, balanced against the rights of the accused. *Niemetz*, 333 A.2d at 892 (footnote and citations omitted).

Here, the facts are analogous to *Niemetz* and its progeny. The crimes occurred repeatedly against very young girls over a two or three year period, as opposed to an isolated incident. Thus, they were not susceptible to being dated with a reasonable degree of certainty. *Commonwealth v. McClucas*, 516 A.2d 68 (Pa.Super. 1986).

Despite minor inconsistencies in their recollection, the girls recounted graphic details of the abuse. The jury heard and observed the girls as they testified, and the credibility of the witnesses and the weight to be accorded the evidence produced are matters within their province. *Commonwealth v. Perez*, 698 A.2d 640, 645 (Pa.Super. 1997) (citations omitted). Based on their testimony, the jury could reasonably believe that the girls were subjected to repeated sexual abuse and find at least one occurrence during each of the relevant years.

CONSPIRACY

In regard to conspiracy, McClure argues there was insufficient evidence to prove an agreement between himself and the father to commit the sex crimes. In order to convict a defendant of a conspiracy, a fact finder must conclude that he reached an agreement with his co-conspirator to commit the crime. 18 Pa.C.S.A. 903(a)(1); *Commonwealth v. Anderson*, 552 A.2d 1064, 1071 (Pa.Super. 1988), *alloc. denied*, 571 A.2d 379 (Pa. 1989) (citations omitted). The existence of a common agreement between co-conspirators, may be inferred from circumstantial evidence surrounding the allegedly conspiratorial activities, and from the relationship between and the conduct of the parties. *Id.*

In the instant case, an agreement can be inferred from the manner in which the crimes occurred. The father sent McClure upstairs to his bedroom with one girl at a time. The girl was then instructed to undress and "play house," which she understood to mean submitting to the various sexual acts. The father would remain in the room, or peek

through or listen at the door, while McClure actually completed the sexual crimes underlying the conspiracy. Based on this coordinated conduct, the friendship of the co-conspirators, and the duration of the abuse, the jury could infer the requisite agreement for conspiracy.

WEIGHT OF THE EVIDENCE

The Superior Court has explained the proper standard of review applicable to a challenge to the weight of evidence:

> A true "weight of the evidence" claim contends the verdict is a product of speculation or conjecture. Such a claim requires a new trial only when the verdict is so contrary to the evidence as to shock one's sense of justice. A decision regarding the weight of the evidence is within the sound discretion of the trial judge whose decision will not be reversed on appeal absent an abuse of that discretion.

Commonwealth v. Dougherty, 679 A.2d 779, 785 (Pa.Super. 1996). A review of the record in this case reveals that the verdict was not against the weight of the evidence.

PROSECUTORIAL MISCONDUCT

Defendant next accuses the prosecution of misconduct arising from several statements made at trial. Generally, comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and

render a true verdict. *Commonwealth v. Morales*, 701 A.2d 516, 527-528 (Pa. 1997). Prosecutorial misconduct will not be found where comments were based on the evidence or proper inferences therefrom or were only oratorical flair. *Id.* at 528. Moreover, in order to evaluate whether the comments were improper, the court must look at the context in which they were made. *Id.*

In opening argument, McClure contends the Commonwealth impermissibly expressed an opinion of his guilt by stating: "My words can't do what they endured justice." N.T. 6/9/98 at 9. This portion of opening argument shows the prosecution was merely introducing the victims and preparing the jury for the graphic nature of the testimony they were about to hear. To cast this statement as other than oratorical flair is to contort its context and substance.

In regard to closing argument, Defendant highlights four instances of alleged prosecutorial misconduct. In the first one, Defendant claims the jury was misled about a police report. However, the prosecutor never mentioned a police report when closing. The statement cited by Defendant is, instead, from the defense's closing argument. N.T. 6/9/98 at 95-96.

Secondly, Defendant claims the prosecutor misstated the law of conspiracy:

> First, criminal conspiracy; acting in accordance with another – specifically Brian James O'Neill, the father – with the intent to achieve a criminal result. Conspirators don't have to have a written contract. They just have to act together to form a result.

N.T. 6/9/98 at 102. Read as a whole, the Court can see no error in this statement. A conspiracy can be inferred from the acts of the conspirators done in furtherance of the criminal aim. *See* discussion *supra*. Moreover, the Court provided a full and proper charge on the elements of conspiracy. N.T. 6/9/98 at 135-139. Therefore, no prejudice inured to Defendant.

The third statement from closing argument arises from the prosecutor calling Defendant's co-conspirator "dirt":

> Ladies and gentleman, I also don't want you to be put off by the number of witnesses. Although there are no corroborating witnesses, ladies and gentleman, the testimony is very clear that Mr. McClure came to Palmerton. The testimony is equally clear that he went up to Dad's bedroom and had his way from each one of them. Who else in that bedroom would I submit to you? *Who would I have to give you in that bedroom? Mr. McClure, who, as Mr. Garfield has pointed out, has chosen not to testify and stand on that? Brian O'Neill? I wouldn't put that dirt on the stand in front of you.*

N.T. 6/9/98 at 112 (emphasis added). A review of the transcript reveals the prosecutor merely mirrored the exact language used by the defense in its closing argument. *Id.* at 92. The prosecutor is entitled to fairly respond to closing remarks made by defense counsel. *Commonwealth v. Hawkins*, 701 A.2d 492 (Pa. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1535, 140 L.E.2d 685. Where both sides used the same oratical flair, the Court cannot fathom how this amounts to prosecutorial misconduct.

Defendant's final challenge is also derived from the above text and focuses on the reference to Defendant's choice not to testify. This passing statement did not imply Defendant was guilty based on his unwillingness to testify, and thus, did not violate his constitutional right against self-incrimination. *Commonwealth v. Kelly,* 528 A.2d 1346 (Pa.Super. 1987), *alloc. denied,* 535 A.2d 1057 (Pa. 1987).

Rather, the remarks were proper rebuttal to the arguments of defense counsel. During closing argument, the defense focussed on Defendant's decision to not testify, the victim's lack of credibility and the limited amount of testimony presented by the prosecution. The prosecuting attorney properly responded by referring to the fact that the dirth of eyewitnesses in the bedroom was due to the hidden nature of sexual abuse.

Additionally, this Court properly instructed the jury on Defendant's absolute right to not take the stand, from which the jury could draw no inference of guilt. N.T.6/9/98 at 133. The Court further advised them that Defendant is presumed innocent and need not present any evidence, because the burden of proof is on the prosecution to prove each and every element of the offenses. *Id.* at 118-119 and 133. Therefore, any prejudice to Defendant was mitigated by these instructions.

INEFFECTIVENESS OF TRIAL COUNSEL

The standard of review when evaluating a claim of ineffectiveness of counsel is well settled. It is presumed that trial counsel is effective and defendant has the burden of proving otherwise. *Commonwealth v. Lewis,* 708

A.2d 497 (Pa.Super. 1998), *alloc. denied*, ___ A.2d ___ (Pa. 1998) (citations omitted). The first determination is whether the issue underlying the claim is of arguable merit. *Id.* If the claim is without merit, then the inquiry ends because counsel will not be deemed ineffective for failing to pursue an issue without basis. *Id.* Even if the underlying claim has merit, the defendant must establish that the course of action chosen by counsel had no reasonable basis designed to effectuate the client's interests and, finally, that the ineffectiveness prejudiced his right to a fair trial. *Id.*

On October 19, 1998, a hearing was held on the issue of the trial attorneys' effectiveness. Although the Court has not set forth separate findings of fact and conclusions of law, we believe that this portion of the discussion clearly enunciates the facts adduced from the hearing and the legal conclusions derived therefrom.

Defendant first claims the defense team was ineffective by pursuing a character defense, instead of an alibi. At the hearing, the trial attorneys, Michael Garfield and Robert Yurchak, testified credibly to discussing the possible defenses with McClure. Ultimately, a character defense was chosen, which would present McClure as an honest family man based on his lack of a criminal record, his good reputation in the community and his consistent denial of the charges.

In addition, the defense attorneys had rejected an alibi defense, because McClure admitted to being present in the victims' home during the years in question, although he denied committing the crimes. Therefore, the real issue was not whether Defendant was somewhere

else when the crimes occurred, *see Commonwealth v. Kolenda*, 676 A.2d 1187 (Pa. 1996), but whether the jury would believe the victim's version of events. The defense strategy of emphasizing Defendant's good character, inferring it was unlikely that he committed any of the offenses, was thus a reasonable one.

When presenting this defense at trial, Defendant asserts that more than four character witnesses should have been called to testify. The defense informed the Court and the jury that there were many character witnesses in the courtroom willing to testify. However, the Court limited the presentation, because it would be cumulative. N.T. 6/9/98 at 81. These four character witnesses lived near McClure, and included an ex-police officer/ex-Marine and three co-workers from the company where Defendant had worked for many years. The Court properly instructed the jury that the testimony of the character witnesses alone could raise a reasonable doubt and justify a verdict of not guilty. N.T. 6/9/98 at 133-134. Therefore, the presentation of the character defense was more than adequate and did not constitute ineffectiveness of counsel.

McClure next states that his work schedule should have been offered into evidence to disprove the alleged frequency of the crimes. However, his attorneys found many time gaps in it, including weekends and vacations, which were consistent with the girls' account. Thus, the work schedule was of limited evidentiary value, if not harmful to the defense.

Related to this issue is trial counsels' alleged ineffectiveness for failing to call certain witnesses. In order to

establish that trial counsel was ineffective for failing to call witnesses, a petitioner must:

> (1) identify the witness or witnesses;
>
> (2) demonstrate that counsel actually knew, or had a duty to know, the identity of the witness or witnesses prior to trial;
>
> (3) demonstrate that the witnesses or witnesses were ready, willing and able to testify for the defense at trial; and
>
> (4) demonstrate that the proposed testimony would have been helpful to the defense asserted at trial.

Commonwealth v. Schultz, 707 A.2d 513, 519 (Pa.Super. 1997).

First, McClure claims his wife should have been called to fill in the gaps in his work schedule. However, the wife could not account for much of the time, because her husband often spent weekends alone in Easton, Pennsylvania, approximately an hour from the scene of the crime.

In addition, Defendant asserts his wife should have been called as a character witness and to recount that no abuse occurred when they twice visited the victims' home together. Defendant's exercise of self-control in his wife's presence was of limited value in showing no abuse during the visits when she was not there. Her worth as a character witness was also compromised by her natural bias as Defendant's spouse. Thus, the relevance and helpfulness of the wife's testimony is questionable, and no ineffectiveness can attach in not calling her.

Defendant next argues his trial attorneys were ineffective in failing to call him to testify at trial. The decision whether to testify is ultimately to be made by the accused after consultation with counsel. *Commonwealth v. Whitney*, 708 A.2d 471 (Pa. 1998). Trial counsel is not ineffective where the decision to not call defendant was reasonable. *Id.*

At the hearing on the Post-Sentence Motion, McClure admitted to discussing the pros and cons of testifying at trial with his attorneys. Although testifying would have allowed him to deny the accusations directly to the jury, it would have opened the chosen defense to attack. Specifically, Mcclure could have been cross-examined about his admissions to the police of a sexual relationship with the victims' mother, who was also the purported common law wife of his friend and co-conspirator. This evidence would have contradicted McClure's claim of good character for chastity and respect for family values.

In addition, testifying could have drawn attention to McClure's repeated visits to the victims' home. This would have given rise to contemplation as to why he continued a relationship with the father, even visiting him in prison while standing accused in the present case. Therefore, it was reasonable to not call McClure to the stand based on his relationship with the victims' family, the character defense, and the decision being left to McClure after full discussion with his trial attorneys. Further, as discussed *supra*, the Court advised the jury that no inference of guilt could be drawn from Defendant's decision to not testify. N.T. 6/9/98 at 133.

McClure also asserts the defense should have called Pat Lennox, Crystal Mervin and his step-daughter to testify at trial. Not only did Defendant fail to demonstrate their willingness and availability to testify, he merely posits questions or theorizes about what they might have stated. Without knowing the content of their proposed testimony, this Court cannot determine its relevance and value to the case.

Similar to this claim, Defendant argues that the defense should have investigated his case more thoroughly, but points to no evidence of an exculpatory or helpful nature, which would have been found. Accordingly, since both claims are based on pure conjecture, the Court can find no merit in them.

In his next allegation of ineffectiveness, McClure states the defense's closing argument failed to properly survey or attack the evidence. In closing argument, Attorney Garfield argued against the credibility of the victims. He also highlighted the role of Defendant's good character and the Commonwealth's burden of proving the charges beyond a reasonable doubt. N.T. 6/9/98 at 88-101. Since these were the key issues, the content of closing argument was reasonable, even if brief.

The final issue is the allegation of counsels' ineffectiveness in failing to properly respond to adverse pretrial publicity. Specifically, McClure asserts the defense should have: 1) questioned the potential jurors about the adverse impact of any pretrial publicity; and 2) filed a motion to change venue and venire.

First, McClure's attorneys did, in fact, ask the jury pool whether they had heard or read about the case in the

newspaper, radio or television. N.T. 6/8/98 at 20. Only one juror responded affirmatively and he, ultimately, was not selected for the jury. *Id.* at 20-21 & 31-32. The Court further advised the selected jurors to avoid learning of the case from the media, since they must decide the case solely on the evidence presented in court. N.T. 6/8/98 at 32.

Secondly, there was no actual prejudice preventing the impaneling of an impartial jury, because only one potential juror had even heard of the case, and he was not chosen. *Commonwealth v. Ricci*, 670 A.2d 1129, 1140 (Pa. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1257, 137 L.E.2d [sic] 337. Also, McClure failed to present any evidence of pretrial publicity, let alone sensational, inflammatory, or slanted coverage. Thus this issue also lacks arguable merit.

Accordingly, we enter the following

ORDER OF COURT

AND NOW, this 20th day of November, 1998, upon consideration of Defendant's Original and Supplemental Post-Sentence Motions, the submissions of the parties, and after argument held, it is hereby

ORDERED and **DECREED** that the Motions are **DENIED**.

BY THE COURT:
/s/ R. Webb

NOTICE OF RIGHTS

The following notice is provided to advise the Defendant:

1. Of the right to appeal to the Pennsylvania Superior Court from the judgment of sentence and such appeal must be filed within 30 days from the entry of this order disposing of Defendant's Post-Sentence Motions, Pa.R.A.P. Rules 108 & 903;

2. Of the right to raise any issue properly preserved in the record below, whether or not included in the Post-Sentence Motions unless otherwise provided by law;

3. Of the right to assistance of legal counsel in the preparation of the appeal;

4. Of the rights to proceed informa pauperis and to have an attorney appointed to assist in preparation of the appeal, if the Defendant is indigent; and

5. That the right to bail after sentencing, when the sentence imposed includes imprisonment of 2 years or more, is within the discretion of the judge. Pa.R.Cr.P. Rule 4009(B) (1).

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
EDGAR D. McCLURE,	:	No. 38 EDA 1999
Appellant	:	

Appeal from the Judgment of Sentence, July 17, 1998, In the Court of Common Pleas of Carbon County, Criminal, No. 260 CR 96

BEFORE: CAVANAUGH, JOYCE, and OLSZEWSKI, JJ.

MEMORANDUM:

FILLED AUG 2 1999

This matter is before the Court on Edgar D. McClure's (Appellant) appeal from the judgment of sentence of the trial court, as made final by the denial of post-sentencing motions.[1] For the following reasons, we affirm. The tragic facts of this case were accurately set forth by the trial court:

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[1] *See Commonwealth v. Chamberlain* 658 A.2d 395, 397 (Pa. Super. 1995), *appeal quashed*, 543 Pa. 6, 669 A.2d 877 (1995) and Pa.R.Crim.P. 1410 and comment thereto (providing that judgment of sentence becomes final for purposes of appeal when the trial court disposes of defendant's post-sentencing motion).

> The facts . . . begin with the dysfunction of the family of the victims, [M.O.][2] and [J.O.], born on November 28, 1979 and October 28, 1985, respectively. The girls have never been married, and are two of the twelve children born to parents Brian and Susan O'Neill. N.T. 6/9/98 at 17-18, 31, 47 & 55. The dysfunction began with Brian subjecting Susan and the Children to physical abuse, *id.* at 19-21 & 48-49, and escalated to his use of threats and beatings to force [M.O.] and [J.O.] to engage in sexual acts with him and with other men. *Id.* at 19-30 & 49-55. Neither girl understood the nature or wrongfulness of the sexual
>
> * * *

On July 17, 1998, the trial judged sentenced Appellant to an aggregate sentence of nineteen (19) to thirty-eight (38) years. Appellant filed post-sentence motions. Following a hearing, the trial judge denied Appellant's post-sentence motions. This timely appeal followed.

Appellant presents the following issues for our consideration: (1) whether the verdict finding Appellant guilty of conspiracy was against the weight and sufficiency of the evidence; (2) whether the trial court erred in failing to find prosecutorial misconduct; and (3) whether the trial court erred in failing to find ineffectiveness of counsel.

In this case, we have thoroughly reviewed the record and studied the briefs. We conclude that the trial court's November 20, 1998 opinion carefully and correctly

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[2] We will identify the victims by using their initials for purposes of confidentiality.

responds to the issues Appellant has raised. We therefore adopt the trial court opinion in its entirety and affirm on that basis. *See* Trial Court Opinion, 11/20/98.

Judgment of sentence affirmed.

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
EDGAR D. McCLURE,	:	No. 38 EDA 1999
Appellant	:	

Appeal from the Judgment of Sentence, July 17, 1998,
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Criminal, No. 260 CR 96

BEFORE: CAVANAUGH, JOYCE, and OLSZEWSKI, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF*, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of* CARBON *County be, and the same is hereby* AFFIRMED.

BY THE COURT:

/s/ David A. Szewczak
PROTHONOTARY

Dated: AUGUST 2, 1999

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 866 M.D. Allocatur Docket 1999
Respondent	:	Petition for Allowance of Appeal from the Superior Court
v.	:	
EDGAR D. McCLURE,	:	
Petitioner	:	

ORDER

(Filed Jan. 14, 2000)

PER CURIAM:

AND NOW, this 13th day of January 2000, the petition for allowance of appeal is denied.